In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1937

METRO BROADCASTING COMPANY, INC.,
APPELLANT,

v.

SECRETARIO DE HACIENDA,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

JURISDICTIONAL STATEMENT

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Opinion Below

The opinion and judgment of the Superior Court of San Juan, Puerto Rico, is unreported. The judgment of the Supreme Court of Puerto Rico denying review of said judgment is unreported. An official translation of the previous decision of the Supreme Court of Puerto Rico upon which the judgment of San Juan Superior Court was

based, *W.A.P.A. TV* v. *Secretario de Hacienda*, is reported at 105 Decisiones de Puerto Rico,[1] pg. 816 and is set forth in the appendix, *infra*, as well as the judgments and opinions previously mentioned.

Jurisdiction

Metro Broadcasting Company filed suit against the Secretary of the Treasury of the Commonwealth of Puerto Rico under the authority of Title 13, Laws of Puerto Rico Annotated, Section 282, challenging an imposition of a property tax upon the radio licenses issued to Metro by the Federal Communications Commission.

Appellant alleged that the imposition of said tax is repugnant to Article VI, Clause 2 of the Constitution of the United States (Supermacy Clause) and therefore invalid.

The San Juan Superior Court, acting upon a previous precedent of the Puerto Rico Supreme Court, decided that the tax was valid and entered judgment against Metro directing that the tax be assessed. The Supreme Court of Puerto Rico denied a petition of Certiorari to review the judgment.

Appellant appeals from the final judgment and order of the Supreme Court of Puerto Rico entered on March 29, 1979, denying appellant's petition for Certiorari and, thus confirming the judgment of the trial court and the validity of the tax.

Notice of appeal was filed in the Supreme Court of Puerto Rico on June 18, 1979.

The validity of the State Tax on the grounds of its being repugnant to the Constitution of the United States was drawn in question at the San Juan Superior Court and at

[1] The Supreme Court of Puerto Rico discontinued the english publication of its decisions effective April 18, 1975. The last published Puerto Rico Reports is Volume 100.

the Supreme Court of Puerto Rico through a motion for Summary Judgment and the Petition for Certiorari filed by appellant, and the decision was in favor of the validity of the statute. Therefore, jurisdiction to review the judgment of the Supreme Court of Puerto Rico, the highest court of the Commonwealth of Puerto Rico, by appeal is conferred on this Court by 28 U.S.C., Section 1258(2).

That such jurisdiction exists in the circumstances of this case is sustained by this Court's decision in *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1944). All federal constitutional questions have been raised and decided against appellant. There is no possibility that the remaining incidents at the trial court may raise any other Federal questions.

Statutes Involved

Sections 301 and 310(b) of the Federal Communications Act, 47 U.S.C., Section 21.40 of Title 47 of the Code of Federal Regulations, Section 443 of Title 13 of the Laws of Puerto Rico Annotated, and its construction by the Supreme Court of Puerto Rico are set out verbatim in the appendix, *infra*, p. 30.

Question Presented

Whether the Commonwealth of Puerto Rico may validly impose a property tax upon the broadcasting licenses issued by the Federal Communications Commission to radio and television stations operating in the Island.

Statement

Metro Broadcasting Company is a Delaware Corporation authorized to do business in Puerto Rico where it operates

two radio stations pursuant to broadcasting licenses issued by the Federal Communications Commission. During its operations in the Island it was always subject to personal property tax on assets such as automobiles, office equipment and the like, which was the only personal property subject to tax in Puerto Rico under 13 L.P.R.A. 443. (The statute appears in the appendix at p. 30).

However, on March 9, 1977, the Puerto Rico Supreme Court held in the case of *W.A.P.A. TV* v. *Secretario de Hacienda*, 105 Decisiones de Puerto Rico 816, that the broadcasting licenses issued by the Federal Communications Commission to radio and television stations in Puerto Rico were also private property of the station owners and, therefore, taxable as personal property under the personal property tax statute of Puerto Rico. *W.A.P.A. TV v. Secretario de Hacienda*, 105 Decisiones de Puerto Rico 816, (Appendix A, at p. 15). In view of said precedent, the Secretary of the Treasury of Puerto Rico imposed a property tax upon the broadcasting licenses of Metro Broadcasting radio stations and assessed the property value of said broadcasting licenses at $511,850.00. All the other assets of Metro were assessed at $200,410.00.[2]

Metro then filed this action in the San Juan Superior Court against the Secretary of the Treasury challenging said tax and it raised there that the imposition of a property tax upon a broadcasting license was contrary to the public policy of the United States as expressed through the plain text of the Federal Communications Act and its

[2] A recent statute approved on May 25, 1979 has granted "tax exemption" to the broadcasting licenses. It does not apply to the facts involved in this litigation and, consequently, appellee's counsel has informed us that the Secretary will insist in collecting the license tax challenged here. In any event, this is merely an "ex gratia" exemption that can be revoked at any time. It underscores the conviction of the Puerto Rican government that it can validly tax the broadcasting licenses.

construction by this Honorable Court, and therefore invalid under the Supremacy Clause of the United States Constitution.[3]

The San Juan Superior Court thought itself bound by the precedent of *W.A.P.A. TV* and entered summary judgment against Metro and ordered that the tax be assessed and paid. (Appendix D, p. 29).

Metro petitioned for Certiorari to the Supreme Court of Puerto Rico, where it raised the same federal constitutional question (Appendix C, pp. 22-24). The Supreme Court denied the petition, thus affirming the judgment of the trial court. (Appendix B, p. 18). Notice of appeal was filed in the Supreme Court of Puerto Rico on June 18, 1979.

The Question Is Substantial

This case presents a new and important question of federal law[4] namely, whether Puerto Rico, or any state, may consider broadcasting licenses as private property under its local substantive law and tax them as such in spite of the fact that the public policy of the United States as expressed by the text of the Federal Communications Act, and its interpretation by this Court is definite that, "no one is to have anything in the nature of a property right

[3] The federal constitutional questions raised before the Supreme Court of Puerto Rico in the *W.A.P.A. TV* case were different from those raised by Metro Broadcasting here. In *W.A.P.A. TV* the appellant challenged the tax on the basis of its being an imposition on an agency of the United States government. *W.A.P.A. TV*, supra, pg. 818 (Appendix A, page 11).

That argument was dismissed by the Puerto Rico Supreme Court in view of the decision of *United States* v. *County of Fresno*, 429 U.S. 452 (1977).

Since our constitutional objection rests on entirely different grounds we need not address ourselves to that precedent.

[4] To our knowledge, the only prior incident of a State license tax upon broadcasting licenses is that reported in *Tampa Times Co.* v. *Burnett*, 45 F. Supp. 166 (1942). The United States District Court there enjoined the State of Florida from collecting such license tax on the grounds of said tax being in conflict with the exclusive federal jurisdiction over the field of communications.

as a result of the granting of a license". *F.C.C.* v. *Sanders*, 309 U.S. 470, 475.

It is our contention that in order to determine the rights and liabilities of station owners with regard to the licenses issued by the F.C.C. the applicable substantive law, as regards to the licenses, is not that of the State but the Federal Communications Act as construed by the federal judiciary.

The Statute mandates that:

> "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels *but not the ownership* thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such licenses shall be construed to create any right, beyond the terms, conditions and periods of the license." (italics ours) 47 U.S.C. 301.

It has been interpreted in *Sanders*, supra, as well as in *Ashbaker* v. *Radio Corp.*, 326 U.S. 327 and *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 391 (1969), that the granting of a radio license does not convey ownership of designated frequencies but only the temporary privilege of using them. As expressed by the District of Columbia Circuit Court of Appeals: "a license is merely a temporary permission to make use of rights belonging to the public and confers no proprietary interests", *M.G. – T.V. Broadcasting* v. *F.C.C.*, 408 F.2d 1257, 1264, footnote 21 (D.C. Cir. 1968).

The interpretation of the Act approved by this Court has become an integral part of the statute which must be accepted and followed by the state courts. *Gulf, Colorado v. Moser*, 275 U.S. 133.

Faced with such a clear construction of the federal statute the Supreme Court of Puerto Rico held that:

> "Appellant's broadcasting license is personal property with the typical attributes of the right of ownership, for it has economic value, is exclusive and transferable and is, therefore, one of the taxable 'matters and things capable of private ownership' according to Article 290 of the Political Code (13 L.P.R.A. 433), and, appellant being a corporation said license shall be assessed as personal property of the corporation, invested, as it is, with the nature of right, franchise or concession". *W.A.P.A. TV* v. *Secretario de Hacienda*, p. 15 of Appendix A)

When such statement was made, the Puerto Rico Supreme Court was aware of the holdings of this court in *Sanders*, supra, but amazingly held that "said decisions do not annul the *proprietary interest*[5] that the license itself has in free trade" (Pg. 819 of *W.A.P.A. TV* v. *Secretario de Hacienda*, Appendix A, pp. 12-13) (court's italics).

This statement negates not only the federal law already cited but the public policy of the F.C.C. which mandates that:

> "No . . . station license, or any rights thereunder shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control, of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience

[5] The English translation prepared by the Puerto Rico Supreme Court renders erroneously "interes propietario" as "possessory interest". This is a mistranslation that weakens the impact of the ruling. "Interes propietario" can only mean "proprietary interest" and as such we have cited the phrase. *W.A.P.A. TV* v. *Secretario de Hacienda*, 105 D.P.R. 816, 819, footnote 6.

and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under Section 308 of this title for the permit or license in question. But in acting thereon the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment or disposal of the permit of license, to a person other than the proposed transferee or assignee." 47 U.S.C. 310(b).

The F.C.C. has such a strong interest in that licenses not be traded in the open market that it treats the transferability of the licenses based on monetary consideration as an offense known as "trafficking." 47 C.F.R. 21.40. Therefore, under the Federal law, licenses cannot have any value in the free market.

The construction given by the Puerto Rico Supreme Court of the rights and liabilities of station owners with respect to the licenses issued by the F.C.C. unmistakably demonstrates the conflict between the local construction of a federal statute and its interpretation by this court.

Although this court has held that a Puerto Rican court should not be overruled in the interpretation of Puerto Rico's substantive law, *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 43 (1970), the interpretation of a Federal Act rests with the federal judiciary and ultimately with this Court. The Acts of Congress as construed by this Court constitute the supreme substantive law in Puerto Rico and must prevail over any local statute to the contrary.

Conclusion

For the reasons stated, these important constitutional issues warrant this Court's consideration of the disregard by the Supreme Court of Puerto Rico of the text of the Federal Communications Act, and its construction by this court, resulting in the imposition of a propery tax upon radio and television broadcasting licenses. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF PUERTO RICO

No. 0-76-421

WAPA T.V. BROADCASTING CORPORATION,
APPELLANT,
v.
SECRETARY OF THE TREASURY,
APPELLEE.

Judgment of the Superior Court, San Juan Part,
ELI B. ARROYO, *Judge*.

MR. JUSTICE DIAZ CRUZ delivered the opinion of the Court.

San Juan, Puerto Rico,
March 9, 1977

Appellant WAPA T.V. Broadcasting Corporation operates a television station in San Juan under a license issued by the Federal Communications Commission (FCC). WAPA T.V. acquired the station and the license when the F.C.C. approved the sale agreed on October 4, 1961, between WAPA and Ponce de Leon Broadcasting, Inc., by virtue of which the latter transferred to appellant the control of the company and the broadcasting license, an essential element of the contract.

In 1972, appellee Secretary of the Treasury assessed WAPA T.V.'s personalty at $2,483,990 and levied a $57,876.97 tax for fiscal year 1970-71, including a specific tax of $20,354.93 levied on the television license, which was assessed at $873,600. The same tax was levied on the license in fiscal years 1971-72 and 1973-74. For 1974-75, said tax was increased to $32,497.99. The taxpayer chal-

lenged the legality of the tax levied on its broadcasting license in four complaints that were consolidated, heard, and dismissed in the Superior Court. In his petition for appeal, which appellant suggests we may also consider as a petition for review, appellant assigns eight errors, summarized in two main contentions: (1) that a broadcasting license granted by the Federal Communications Commission (FCC) is not taxable personal property; and (2) that the tax is actually an imposition on an agency of the Federal Government whose property is tax-exempt.

I

Regarding taxable personal property, art. 290 of the Political Code (13 L.P.R.A. §443):

> "All property not expressly exempt from taxation shall be assessed as taxable. . . .
>
> "Personal property shall include . . . patent-rights,[1] trade-marks, franchises, concessions, and all other matters and things capable of private ownership and not included within the meaning of the term 'real property' . . ."

The broadcasting license granted by the F.C.C. is not included among the tax-exempt properties enumerated in art. 291 of the Political Code (13 L.P.R.A. §551). The Superior Court correctly held that said license constitutes taxable *personal property*.

Said license represents a valuable asset[2] for WAPA inasmuch as, without the same, the value of the structures, equipment and installations which give it its going-concern value would be nominal. Appellant has acknowledged this

[1] [*Translator's note: In the original opinion in Spanish, reference is made to the fact that the term *patent rights* was translated as "derechos de privilegio" in the Spansh text of Laws of Puerto Rico Annotated (13 L.P.R.A. §443), but was subsequently translated as "derechos de patente" in *Gonzalez Chemical* v. *Sec. of Treas.*, 86 P.R.R. 67 (1962).]

[2] "A highly valuable privilege", as appellant calls it in its brief, p. 23.

since the very beginning, when it made certain specifications in the 1961 contract by which it acquired the assets of Ponce de Leon Broadcasting Company. It specified that the purchase included all the licenses and all its rights as a licensee of a television station,[3] and subjected the performance and execution of the contract to the approval of the transfer by the Federal Communications Commission.[4] The regulatory function of this agency, which is mainly that of assigning frequencies or television channels and maintaining those transmission standards that best serve the public interest, necessity, and convenience[5] is not an isolated incident among the wide range of modifications that the right to private ownership has undergone in our time.

Appellant's contention that its right to hold a license has no "ownership" characteristics[6] because it cannot

[3] The text of said part of the agreement reads as follows at page 40:

> "The Buyer shall purchase from the Company, and the Company shall sell to the Buyer, all of the Company's assets and business as a going concern including, without limitation, *all of the Company's good will, leases and contracts, licenses and all of its rights as licensee* of television station WAPA-TV at San Juan, *Puerto Rico, for the sum of One Million Five Hundred Thousand Dollars* ($1,500,000), plus the value . . . of the account identified 'Deferred Film Rental' exclusive of the value of the film series 'MAVERICK', 'PANIC', and 'PHILLIP MARLOWE' . . ." (Emphasis supplied)

[4] In its art. II(b)(ii), the contract provides:

> "(ii) It is specifically understood and agreed that the consummation of this Agreement in all respect shall be subject to the Federal Communications Commission's prior consent to the transfer of control of the Company."

[5] "The statute mandates the issuance of licenses if the 'public convenience, interest or necessity will be served thereby'. 47 U.S.C. 307(a)". *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 394 (1969).

[6] In the following cases—*F.C.C.* v. *Sanders Bros.*, 309 U.S. 470 (1940), *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945) and *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969)—the courts denied to the licensees ownership over the transmission channels and the assigned frequencies; hence, pursuant to arts. 301 and 304 of the Federal Communications Act (Title 47 U.S.C.A.), no allegation of "acquired rights" may be made before the F.C.C. Said decisions do not invalidate the *possessory interest* which the license itself represents in the free enterprise system.

be freely disposed of constitutes a relapse into the unitary and indivisible concept of ownership, of seigniory, which has been replaced in modern Civil Law, and which does not consider the limitations on ownership as strange and unheard of anomalies of a right which by nature is absolute, but rather constitutive of common law ownership. *Commonwealth* v. *Rosso*, 95 P.R.R. 488, 503, 511 *et seq.* (1967). "The concept of ownership lost a long time ago the monolithic strictness woven around the power of alienation which art. 280 [of the Civil Code] assigns to the owner. To the disintegration of the unitary concept, impelled by a social sense and by the emergence of multiple classes of property with new profiles and peculiar characteristics, a new definition of ownership has followed, in which Roca, Castan, and Puig Brutau agree as 'the real right which ascribes its titleholder the broadest possible power of command over a corporal thing, within institutional limits, with a fully autonomous character, perpetual (in principle), elastic, and, in part, of a discriminable content.' Castan, *ibid.* at 108." *Ortiz Roberts* v. *Ortiz Roberts*, 103 P.R.R. ——.

But the power of the State and the rights of a person in the area of taxes are not governed by the Civil Code or by the Mortgage Law, but by the Income Tax Act. *Albanese* v. *Secretary of the Treasury*, 76 P.R.R. 302 (1954). The North American case law holds that even though licenses to use designated radio and television frequencies are limited to periods of three years, renewals for successive three-year periods ar taken for granted as long as the holder of the license complies with the public interest conditions imposed by the Federal Communications Commission. This creates in the licensee the expec-

tancy of continued renewal and enjoyment of the license and of its economic advantages for an indefinite period of time.[7] *Richmond Television Corp.* v. *United States*, 354 F.2d 410, 412. The three-year limitation and the intervention of the regulatory agency in the normal course of businesses and enterprises do not keep the licensee from enjoying his license, which forms part of his assets, grows with the economic forces of increment and goodwill, generates profits and becomes part of the business world because the licensee may transfer it following the F.C.C.'s approval and, at that time he will receive its commercial value in the price agreed upon in the purchase contract. Profitable transmission frequencies and channels are not infinite, for which reason an operating television station of a known channel, with a license and goodwill is more commercially valuable, vis-a-vis the alternative of beginning to apply for a new license and building the plant. In a field as practical as taxes, the clearly proprietary interest that is identified with patrimonial content, value, utility, and benefits which this license represents for the licensee are more important than the academic integration of classical elements in the now renovated concept of property. *Maristany* v. *Sec. of the Treasury*, 94 P.R.R. 276, 284-85 (1967). Form cannot supersede substance. The possessor's interest in the asset,[8] when he has all the

[7] ". . . in the absence of misconduct, what reason could arise to cause the Commission to deviate from its consistent practice and refuse renewal? . . . The taxpayer has furnished its own appraisal of the insubstantiality of any such conjecture. It has in fact proceeded in 1956 and 1957 and in the succeeding years . . . on the only reasonable assumption—that its *license, while technically granted for only three years at a time is in economic operation one of indefinite duration.*" (Emphasis supplied). *Richmond Television Corp., supra.*

[8] Taxable property does not correspond to the traditional concept of individual and indivisible property set forth in our decision in *Gonzalez Chemical* v. *Sec. of the Treas.*, 86 P.R.R. 67 (1962).

practical attributes of ownership, shall be held a proprietary interest. *Cf. De la Haba* v. *Tax Court; Treas., Int.*, 76 P.R.R. 865 (1954); *United States* v. *County of Fresno*, — U.S. —, judgment of January 25, 1977 — 45 L.W. 4131. Appellant's broadcasting license is personal property with the typical attributes of the right of ownership, for it has economic value, is exclusive and transferable and is, therefore, one of the taxable "matters and things capable of private ownership", according to art. 290 of the Political Code (13 L.P.R.A. § 443); and, being appellant a corporation, said license shall be assessed as personal property of the corporation, invested, as it is, with the nature of right, franchise[9] or concession. Article 317, Political Code (13 L.P.R.A. §464). The reasonableness of the tax is not challenged, therefore, this case is one in which the Commonwealth Government's taxing power has been exerted in proportion to appellant's activities and to the subsequent enjoyment by appellant of the opportunities and

The concept of taxable property has evolved towards the theory of divisibility, which recognizes property as a set of rights over a thing and whoever possesses one of those rights is considered the owner for tax purposes. *Ibid*, p. 72. Keesling, the same author cited in *Gonzalez Chemical, supra*, holds that for property tax purposes, the prevailing doctrine is that of divisibility. Keesling, *Conflicting Conceptions of Ownership in Taxation*, 44 Calif. L. Rev. 866, 868 (1956).

[9] "Franchise" and "license", close terms both in rhetoric and content, have been repeatedly used as synonyms. *City of Griffin* v. *First Federal Savings & Loan Ass'n*, 55 S.E.2d 771, 773 (1949); *American States Water Service Co. of California* v. *Johnson*, 88 P.2d 770, 773 (1939); *Nebraska Telephone Co.* v. *Lincoln*, 121 N.W. 442 (1909). A franchise is also property. *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 41 L.Ed. 1165; *West River Bridge Co.* v. *Dix*, 6 How. 507, 12 L.Ed. 535. A license granted to operate a business invested with a public interest such that justifies its regulation by the state is a franchise. *New State Ice Co.* v. *Liebman*, 285 U.S. 262, 273 (1932). Franchises constitute property and hence they are taxable. 1A Thompson, *Real Property*, § 295, at p. 508 (1964 ed.). 14 Fletcher, *Cyclopedia of Corporations*, § 6950, p. 555; Joyce, *Franchises*, § 26, p. 80.

protection offered by the State. *General Motors* v. *Washington*, 377 U.S. 436 (1964).

II

Appellant's contention that the levying of property tax on its broadcasting license impairs and obstructs the Federal Government and its Federal Communications Commission's public policy and that, therefore, it invades the area of supremacy of Congress, is untenable. Congress saw no need to extend tax exemption to such licenses; the power of the Commonwealth of Puerto Rico to raise revenue by levying taxes is unquestionable, even without the authorization contained in sec. 3 of the Federal Relations Act that "taxes and assessments on property, income taxes, internal revenues, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and designed by the Legislature of Puerto Rico", *R.C.A.* v. *Gov't of the Capital*, 91 P.R.R. 404 (1964); and finally, the F.C.C., and not the license in itself, is the instrumentality in question which receives no tax impact in this case. This would be enough to take the facts out of the rule of *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 314, 427 *et seq.* (1819), particularly considering that the Supreme Court of the United States has just validated a tax levied by the State of California on the use or possessory interest of the employees of the U.S. Forest Service in Government owned houses which said service provides them as part of their salary, reiterating the rule that "a State may in effect raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." *United States* v. *County of Fresno*, *supra*.

The appeal does not present a substantial constitutional question, and as a petition for review it has not disturbed the well-grounded decision of the Superior Court.

Affirmed.

[SEAL]

[STAMPS]

ACR/is/hp

APPENDIX B

IN THE SUPREME COURT OF PUERTO RICO

No. 0-79-99 Certiorari

METRO BROADCASTING COMPANY, INC.,
PLAINTIFF-PETITIONER,
v.
SECRETARY OF THE TREASURY,
DEFENDANT-RESPONDENT.

ORDER

San Juan, Puerto Rico,
March 29, 1979.

The Petition for Certiorari is denied. Chief Justice, Trias Monge, did not intervene.

Signed ERNESTO L. CHIESA
Secretary

APPENDIX C

IN THE SUPREME COURT OF PUERTO RICO

METRO BROADCASTING COMPANY, INC.,
PLAINTIFF-PETITIONER,
v.
SECRETARY OF THE TREASURY,
DEFENDANT-RESPONDENT.

PETITION

TO THE HONORABLE COURT:

Comes now Petitioner and most respectfully prays:

I. *Jurisdiction*

This Court has jurisdiction over this cause in that it arises under Article 14 of the Judiciary Act (4 LPRA 37(f)) and Article 671 of the Code of Civil Procedure (32 LPRA 3492).

II. *Appealed Order*

Petitioner prays that the Order issued on December 11 in *Metro Broadcasting Company, Inc.* v. *Secretary of Treasury,* Civil No. 76-2140 about Personal Property Tax, in the Superior Court of Puerto Rico, San Juan Part, be reviewed.

III. *Statement of the Case*

Petitioner operates two radio broadcasting stations in the metropolitan area: WQII, known as 11-Q and WSRA, known as Z-93. Both stations operate by virtue of a permission issued by the Federal Communications Commission pursuant to the Federal Communications Law of 1934, 47 USCA 151-744.

The Secretary of the Treasury determined that the licenses had a taxable value of $511,853 and levied a personal property tax on them.

Petitioner filed a lawsuit challenging said value, since radio broadcasting licenses lack value on the market, nor can have it, according to the federal law.

By way of summary judgment, an attempt was made to dispose of the issue, but the lower court felt bound by *WAPA-TV* v. *Secretary of Treasury,* 105 DPR 816, Opinion of March 9, 1977, and the Motion for Dismissal was denied. The issue therefore, is now brought to the corresponding forum.

IV. *Issue Presented*

If the radio broadcasting licenses issued by the Federal Communications Commission can have a taxable value as the one assessed by the Secretary of the Treasury of Puerto Rico.

V. *Argument*

The legal issue in the present case is if the Secretary of the Treasury can consider the licenses issued by the Federal Communications Commission to operate the radio stations WQII-AM and WSRA-FM and assessed in $511,853 as personal property subject to taxation.

If such tax levied on the licenses is well founded, it would arise pursuant to Article 290 of the Political Code which provides for the levying of tax on personal or real property.*

---

* § 443. Property to be assessed; definition of real and personal property

All property not expressly exempt from taxation shall be assessed as taxable. For the purposes of assessment for taxation real property shall be deemed to be the land, the subsoil, the structures, objects, machinery or implements attached to the building or fixed on the ground in a manner showing permanence, without considering if the owner of the object or machinery is owner of the building, or if the owner of the structure or other object lying on the ground is owner of the land; and without taking into consideration other aspects, such as the intent of the parties in contracts affecting said property, or other aspects which are not objective conditions of the property itself in the manner in which it is attached to the building or fixed on the ground and which may assist in the objective classification of the property itself as real or personal.

Personal property shall include such machinery, vessels, instruments or implements not attached to the building or fixed to the ground in a manner showing permanence, livestock, money, whether in the possession of the owner thereof or held by or on deposit with some other person or institution, bonds, stocks, credit certificates in unincorporated syndicates or partnerships, patent-rights, trade-marks, franchises, concessions, and all other matters and things capable of private ownership and not included within the meaning of the term "real property", but shall not include drawing account credits, savings accounts, time deposits, promissory notes, or other personal credits. 13 LPRA 443.

On March 9, 1977, this Honorable Court decided the case of *WAPA-TV* v. *Secretary of Treasury,* 105 DPR 816. The same holds that:

> "Appellant's broadcasting license is personal property with the typical attributes of the right of ownership, for it has economic value, is exclusive and transferable and is, therefore, one of the taxable "matters and things capable of private ownership", according to Art. 290 of the Political Code".

It would seem that said holding definitely disposes of the matter and hinders a different argument on the subject. As we examine the holding of *WAPA-TV,* we shall see that it is not controlling over the present issue.

It is well known that from the opinion's issued by this Honorable Court, only what is known as the "ratio decidendi", binds as a precedent. *Moran* v. *Court,* ___ PRR ___. The "ratio" is the reasoning or principle, or ground upon which a case is decided. *Ballantine's Law Dictionary,* 3rd Ed., 1969.

Therefore, an issue not brought to the attention of the Court when deciding its decree, is not a part of the opinion, and being of significant importance can be raised any time.

This court's express policy has been to decide the issues according to the most correct interpretation of law, without the judges being blindly attached to previous decisions,

not even of the same suit decided by different judges. Concepts such as "the law of the case" and "stare decisis" are characteristics of common law, but not of civil law and cannot be implied inflexibly by our tribunals. *Torres Cruz* v. *Municipio de San Juan*, 103 DPR 217, 221 and 222, Opinion of January 9, 1975.

In other words, Courts must be willing to hear new legal issues brought forth, so that their decisions reflect the best possible judicial analysis under the particular circumstances of each case.

Let us see, then, what legal issue wasn't brought to the attention of the Supreme Court in *WAPA-TV*, distinguishing it from the present case.*

The second clause of Article VI of the United States Constitution provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".

This clause means that federal laws have precedence over any contrary provision of any state law or constitution.

The aforementioned Supremacy Clause not only covers the text of the federal law in question but also the interpretation given by the United States Supreme Court to the federal statute. In the words of Justice Black: "When this Court interprets a statute, then the statute becomes what this Court has said it is". *Boys Market* v. *Retail Clerks Union*, 398 U.S. 235, 257 (1970); see also: *Gulf, Colorado*

* Examining appellant's brief, we see the different concepts and views that led to WAPA's decision. WAPA's attorney sustained that the license represented a "valuable asset", page 818, which was contrary to legal reality.

& Santa Re Railway Co. v. *Moser*, 275 U.S. 133. "The interpretation approved by the Supreme Court of the United States of an act of Congress becomes an integral part of the statute", Syllabus, page 133.

Therefore, when a federal statute defines a legal concept, the same has to be outlined by state tribunals as Congress has established it on its statute and as the federal courts have interpreted it.

The abovementioned rule has been expressed on such numerous opinions that it is enough to quote the legal encyclopedia on the subject:

> "Since the Constitution of the United States provides (Art. 6 § 2) that the laws made in pursuance thereof shall be the supreme law of the land, anything in the constitution or laws of a state to the contrary notwithstanding, an act of Congress constitutionally passed within the limits of its authority becomes a part of the supreme law of the land in connection with the Federal Constitution itself. Federal statutes operate essentially as a part of the law of each state and are as binding on its authorities and people as are its own local constitution and laws in the same manner as if they were actually embodied in the Federal Constitution".
>
> "Since laws enacted in pursuance of the Federal Constitution are given supreme status by the terms of the Constitution itself, it follows that such federal laws control the constitution and laws of the states, and cannot be controlled by them. State laws are always subordinate and federal laws enacted pursuant to the Constitution are always paramount, hence, a state law is void if contrary to a valid act of Congress. And Congress may, with the support of the supremacy clause, declare state regulations inapplicable to federal government activity. The United

States Supreme Court has said that since the powers exercisable by the United States may not be exercised throughout the nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state". (16 Am. Jur. 2d. Constitutional Law, Sections 53 & 55, pages 225-227).

Therefore, to determine the substantive law in Puerto Rica regarding a license to operate a broadcasting station we must remit ourselves to the federal law and to the interpretation given by the United States tribunals. This is by constitutional mandate the Supreme law in all state tribunals. *Pueblo* v. *Perez*, 50 PRR 551, 553, 554.

In this respect, we find that the United States Supreme Court has uniformly interpreted that there can be no propperty right whatsoever over a television or radio license, *FCC* v. *Sanders,* 309 U.S. 470, 475.*

The federal government itself has incorporated a regulation pursuant to the Federal Communications Commission Law to prevent any attempt to bargain with the licenses issued by the Federal Communications Commission, 47 CFR 21.40.

According to the statute that establishes and creates radio licenses (one of which plaintiff allegedly owns) one cannot sell, mortgage, give or dispose of it in any way, 47 CFR 21.40.

Sections 301 and 304 of the Federal Communications Law of 1934, 47 USCA 301, 304, clearly express that the licenses issued do not constitute property and that the mere granting of the license does not give any property right to the holder of the same.

---

* The policy of the Act is clear that no person is to have *anything* in the nature of a property right as a result of the granting of a license. *Sanders,* supra. (emphasis supplied) Even though WAPA-TV mentions Sanders, its doctrine wasn't examined in the light of the supremacy clause issue herein presented.

Therefore, if the Secretary's determination prevails, plaintiff would be considered the owner of the radio license and as such subject to taxation over said "property", while she would not have the practical attributes of ownership such as disposal and encumbrance of the property.

Our research has shown that there is no similar tax on any U.S. jurisdiction. This explains the absence of court decisions on the subject. Around 1942, the state of Florida levied a similar tax, but was hindered by a Federal Court decision. *Tampa Times Company* v. *Burnett,* 45 F. Supp. 166. On that case, the Court issued an injunction forbidding the collection of the tax because of the constitutional ground here invoked.

These constitutional grounds should bring the annulment of the tax in controversy.

WHEREFORE, it is respectfully prayed that a writ of Certiorari be issued and that the appealed order be left without effect.

San Juan, Puerto Rico, at ____ day of March 1979.
CERTIFIED:

_____

APPENDIX D

SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

Civil Nos. 76-2140
77-2275
PERSONAL PROPERTY TAX

METRO BROADCASTING COMPANY, INC.,
PLAINTIFF,
v.
SECRETARY OF THE TREASURY,
DEFENDANT.

PARTIAL JUDGMENT

The complaint filed by Metro Broadcasting Company challenges the Secretary of Treasury notification of the personal property tax for the years 1975-76 and 1976-77, which includes a specific tax for "License" assessed on $511,850. Plaintiff alleges that said amount is not taxable and therefore, the Secretary's determination is erroneous, arbitrary and illegal.

Plaintiff prays that this Court order defendant to correct the personal property tax receipts for the aforementioned years eliminating the amount of $511,850 levied on the license.

After using the methods for discovery and deciding some procedural incidents, the Secretary of Treasury filed a motion for Summary Judgment on June 25, 1978. Plaintiff filed a motion in opposition to defendant's motion alleging that there is a controversy of fact that must be disposed of on a plenary trial.[1] These motions were not decided and

[1] Said motion was filed on February 1, 1978 with no sworn statement affixed to it.

a Pretrial Conference was held on March 14, 1978. As of April 20, 1978, Calderon, Rosa-Silva & Vargas joined as legal counsel for plaintiff and on June 1, 1978 filed a motion for Summary Judgment in which they allege the following:

1. The fiscal responsibility of the appearing party rests on the fact that if the licenses issued by the Federal Communications Commission to operate the radio stations WQII-AM and WSRA-FM are personal property of the defendant and therefore subject to be assessed according to Section 443 of Title 13 of PRLA.
2. As it appears from the memorandum attached hereto, the interpretation given by the Supreme Court of the United States to the concept of radio licenses is that the same is not the property of any individual.
3. Said interpretation given by the U.S. Supreme Court has priority over any contrary interpretation given by another court, state or federal.

Article VI, 2nd Clause, United States Constitution.

Plaintiff accompanies a Law Memorandum to support his position. On July 13, 1978, the Secretary of Treasury filed a motion in opposition to plaintiff's motion for Summary judgment.

On a hearing held on August 3, 1978, plaintiff sustains that the present suit poses a constitutional question that was not decided by our Supreme Court on *WAPA-TV Broadcasting Co.* v. *Secretary of Treasury*, opinion rendered on March 9, 1977.[2]

Plaintiff holds that the tax levied on its broadcasting license issued by the Federal Communications Commission is contrary to law because according to the law creating the Commission, said licenses do not constitute property nor can there be any property right over them. Plaintiff

[2] The parties agreed that this Court determine the taxable nature of the license; the value assessed by the Secretary would be determined in further proceedings.

sustains that the provisions of the federal law have "precedence over any contrary provision of any constitution or state law" by virtue of Article VI, 2nd Clause of the United States Constitution that provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Plaintiff holds that when our Supreme Court decided WAPA's suit,[3] which is the case controlling the issue on the present suit, it did not take into consideration said constitutional question.

We issue the present judgment to decide the issue posed by plaintiff on his motion for Summary Judgment of whether the license referred to in the present suit is taxable according to Section 443 of Title 13 of LPRA.

The *WAPA* case, *supra*, holds that the broadcasting license which the Federal Communications Commission issued to operate a Television Station is personal property subject to taxation in our jurisdiction.

We have examined said opinion and understand that plaintiff's contention lacks legal status. Plaintiff's arguments do not convince us of varying our Supreme Court's

[3] On said case the Court held that:

> "Appellant's broadcasting license is personal property with the typical attributes of the right of ownership, for it has economic value, is exclusive and transferrable and is, therefore, one of the taxable "matters and things capable of private ownership", according to Art. 290 of the Political Code (13 LPRA 443); and, appellant being a corporation, said license shall be assessed as personal property of the corporation, invested, as it is, with the nature of right, franchise or concession. Art. 317, Political Code (13 LPRA 464)."

doctrine in respect to the taxable nature of the broadcasting license issued by the Federal Communications Commission. The rule of law set forth in *WAPA* is of complete application to the questions posed in the present suit.

This Court understands that the Supreme Court analyzed all the provisions of the law that creates the Federal Communications Commission in harmony with the powers granted by law to the Secretary of Treasury to raise revenue and to the Commonwealth of Puerto Rico to levy them.[4]

For all the aforesaid, plaintiff's motion for Summary Judgment is denied and partial judgment is entered determining that the broadcasting license issued by the Federal Communications Commission to Metro Broadcasting Company is taxable.

Proceedings will continue as to the value assessed by the Secretary to said license when determining the tax to be paid.

---

[4] The Supreme Court said:

> "Appellant's contention that the levying of property tax on its broadcasting license impairs and obstructs the Federal Government and its Federal Communications Commission's public policy and that, therefore, it invades the area of supremacy of Congress, is untenable. Congress saw no need to extend tax exemption to such licenses; the power of the Commonwealth of Puerto Rico to raise revenue by levying taxes is unquestionable, even without the authorization contained in Sec. 3 of the Federal Relations Act that "taxes and assessments on property, income taxes, internal revenues, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal government, respectively, as may be provided and designed by the Legislature of Puerto Rico". *R.C.A.* v. *Gov't of the Capital*, 91 P.R.R. 404 (1964); and finally, the FCC, and not the license in itself, is the instrumentality in question which receives no tax impact in this case."

APPENDIX E

13 L.P.R.A.

§ 443. Property to be assessed; definition of real and personal property

All property not expressly exempt from taxation shall be assessed as taxable. For the purposes of assessment for taxation real property shall be deemed to be the land, the subsoil, the structures, objects, machinery or implements attached to the building or fixed on the ground in a manner showing permanence, without considering if the owner of the object or machinery is owner of the building, or if the owner of the structure or other object lying on the ground is the owner of the land; and without taking into consideration other aspects, such as the intent of the parties in contracts affecting said property, or other aspects which are not objective conditions of the property itself in the manner in which it is attached to the building or fixed on the ground and which may assist in the objective classification of the property itself as real or personal.

Personal property shall include such machinery, vessels, instruments or implements not attached to the building or fixed to the ground in a manner showing permanence, livestock, money, whether in the possession of the owner thereof or held by or on deposit with some other person or institution, bonds, stocks, credit certificates in unincorporated syndicates or partnerships, patent-rights, trademarks, franchises, concessions, and all other matters and things capable of private ownership and not included within the meaning of the term "real property", but shall not include drawing-account credits, savings accounts, time deposits, promissory notes, or other personal credits.—Political Code, 1902, § 290; Mar. 10, 1904, p. 167, § 5; Mar. 20, 1951, No. 30, p. 64, § 1, eff. Mar. 20, 1951, retroactive to Jan. 1, 1951.

47 U.S.C.

§ 301. License for radio communication or transmission of energy

"It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. June 19, 1934, c. 652, Title III, § 301, 48 Stat. 1081.

§ 310(b). No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public, interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee. June 19, 1934, c. 652, Title III, § 310, 48 Stat. 1086; July 16, 1952, c. 879, § 8, 66 Stat. 716; Aug. 28, 1958, Pub.L. 85-817, § 2, 72 Stat. 981.

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47 C.F.R.

§ 21.40 Considerations involving transfer or assignment applications.

(a) The Commission will review a proposed transaction to determine if the circumstances indicate "trafficking" in licenses or construction permits whenever applications (except those involving a *pro forma* assignment or transfer of control) for consent to assignment of a common carrier construction permit or license, or for transfer of control of a corporate permittee or licensee, involve facilities which have been operated for less than two years by the proposed assignor or transferor. At its discretion, the Commission may require the submission of an affirmative, factual showing (supported by affidavits of a person or persons with personal knowledge thereof) to demonstrate that

the proposed assignor or transferor has not acquired an authorization or operated a station for the principal purpose of profitable sale rather than public service. This showing may include, for example, a demonstration that the proposed assignment or transfer is due to changed circumstances (described in detail) affecting the licensee or permittee subsequent to the acquisition of the permit or license, or that the proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests.

(b) If a proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests, any showing requested under paragraph (a) of this section shall include an additional exhibit which:

(1) Discloses complete details as to the sale of facilities or merger of interests;

(2) Segregates clearly by an itemized accounting, the amount of consideration involved in the sale of facilities or merger of interests; and

(3) Demonstrates that the amount of consideration assignable to the facilities or business interests involved represents their fair market value at the time of the transaction.

(c) For the purposes of this section, the two year period is calculated using the following dates (as appropriate):

(1) The initial date of grant of the construction permit, excluding subsequent modifications;

(2) The date of consummation of an assignment or transfer, if the station is acquired as the result of an assignment of construction permit or license, or transfer of control of a corporate permittee or licensee; or

(3) The median date of the applicable commencement dates (determined pursuant to paragraph (c) (1) and (2) of this section) if the transaction involves a system (such as a Point-to-Point Microwave System) of two or more

stations. (The median date is that date so selected such that fifty percent of the commencement dates of the total number of stations, when arranged in chronological order, lie below it and fifty percent above it. When the number of stations is an even number, the median date will be a value half way between the two dates closest to the theoretical median).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1937

METRO BROADCASTING COMPANY, INC.,
Appellant,

v.

SECRETARIO DE HACIENDA,
Appellee.

On Appeal from the Supreme Court of the Commonwealth of Puerto Rico

---

MOTION TO DISMISS OR TO AFFIRM

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MOTION TO DISMISS OR TO AFFIRM

TO THE HONORABLE COURT:

Now comes appellee, the Secretary of the Treasury of the Commonwealth of Puerto Rico, hereinafter named as the appellee, and respectfully moves this Honorable Court to dismiss the appeal in the above entitled case on the grounds that jurisdiction was improperly invoked either before the Supreme Court of Puerto Rico and before this Honorable Court, or to affirm the Partial Judgment of the Superior Court of the Commonwealth of Puerto Rico, San Juan Part, on the grounds that the questions presented by the ap-

peal are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

Appellant herein, a corporation authorized to do business in Puerto Rico, Metro Broadcasting Company, filed suit against the Secretary of the Treasury of the Commonwealth of Puerto Rico, challenging an imposition of a personal property tax upon the radio licenses issued to Metro by the Federal Communications Commission.

Appellant alleged that the imposition of said tax is repugnant to Article VI, Clause 2 of the Constitution of the United States (Supremacy Clause) and therefore invalid.

The San Juan Superior Court, acting upon a previous precedent of the Puerto Rico Supreme Court, decided that the tax was valid and on November 27, 1978 entered judgment against Metro, directing that the tax be assessed.

On March 7, 1979, appellant filed a Petition for a Writ of Certiorari before the Supreme Court of Puerto Rico.

On March 29, 1979 the Supreme Court of Puerto Rico denied the Petition of Certiorari. The present appeal follows.

ARGUMENT

I

JURISDICTION WAS IMPROPERLY INVOKED

The jurisdiction of this Honorable Court was invoked under 28 USC., Section 1258(2). Said statute provides that:

> "Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:
>
> (1) . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.
>
> (3) . . . .

Appellee herein respectfully submits that this Honorable Court lacks jurisdiction to entertain this case under the above quoted provision or under any other provision. Our contention is based, first of all, on the ground that appellant herein did not comply with the jurisdictional provisions of the Commonwealth of Puerto Rico applicable to this case.

The Partial Judgment of the Superior Court of the Commonwealth of Puerto Rico in this case was rendered on November 27, 1978 and entry of a copy of the notice of said Partial Judgment was made on November 30, 1978.

Since that Partial Judgment was a final judgment as to the questions considered and solved therein on the merits,[1] if appellant thought that said judgment involved a substantial constitutional question, and it wanted that judgment or decree to be reviewed by the Supreme Court of Puerto Rico, it had to comply with the requirements of Section 14(a) of the Judiciary Act of the Commonwealth of Puerto Rico (Title 4 of the Laws of Puerto Rico Annotated, Section 37(a) and with the Rule 53.1(a) of the Rules of Civil Procedure of the Commonwealth of Puerto Rico, (Title 32 of the Laws of Puerto Rico Annotated, App. II, R. 53.1(a)).[2]

[1] A 'final decision' is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination. See *Know National Farm Loan Ass'n* v. *Phillips*, 300 U.S. 194, 197, 198, 57 S.Ct. 418, 81 L. Ed. 599, 108 A.L.R. 738; *Trustees* v. *Greenough*, 105 U.S. 527, 26 L. Ed. 1157; *Gay* v. *Hudson River Electric Power Co.*, 2 Cir., 184 F. 689; *Dant & Pusell* v. *J. D. Halstead Lumber Co.*, 9 Cir., 103 F.2d 306.

As it has been ruled by this Honorable Court:

> "The fact that there were to be further proceedings in the state court did not render the state judgment 'nonfinal or unappealable within the meaning of 28 USC §1257 ... "*North Dakota Pharmacy Bd.* v. *Snyder's Stores* 414 U.S. 156, 38 L Ed 2d 379 (1973)".
>
> Decisions of this Honorable Court constructing Section 1257 of Title 28 of the United States Code are good authorities for the construction of Section 1258 of Title 28 of said Code. *Ocean Park Development Corp.* v. *People of Puerto Rico*, 145 F2d 247 (1944), certiorari denied 323 US 793, 89 L Ed 632.

[2] 4 L.P.R.A. §37(a)

Section 14(a) of the Judiciary Act, supra, provides as follows:

> §37.—Review of rulings of Court of First Instance
>
> (a) Except as provided in clause (d) of this section, final judgments rendered by the Superior Court in civil cases involving or deciding a substantial constitutional question under the Constitution of the United States or the Constitution of Puerto Rico, and final judgments in criminal cases originated in the Superior Court, shall be appealable to the Supreme Court. The filing of notice of appeal shall stay all proceedings in the Superior Court with respect to the judgment or part thereof on appeal, or the questions comprised therein, but the Superior Court may proceed with the suit as to any question involved therein not comprised in the appeal, and if the judgment on appeal provides for the sale of goods liable to loss or deterioration, the Superior Court may order that the same be sold and the proceeds of the sale be deposited therein until the Supreme Court shall enter judgment".[3]
>
> (4 L.P.R.A. 37(a)). Emphasis added.

Rule 53.1(a) of the Rules of Civil Procedure of Puerto Rico provides:

> "An appeal is perfected by filing a notice of appeal with the clerk of the Part of the Court where the case was heard, and a copy thereof shall be filed in the Clerk's Office of the Court of

[3] 32 L.P.R.A., App. II, R. 53.1(a) Clause (d) of Section 37, which is not applicable to this case, refers to the judgments rendered by the Superior Court in appeals coming from the District Court of the Commonwealth of Puerto Rico and in proceedings for review, based on the record of the proceedings had at the administrative level, or by way of trial *de novo*, of the rulings, orders or resolutions of administrative bodies.

> Appeals, *within thirty (30) days after a copy of the notice of judgment is filed in the record of the case.*"
>
> (32 L.P.R.A., App.II, R. 53.1(a), Emphasis added.

As we have already mentioned, the Partial Judgment in this case was rendered on November 27, 1978 and entry of a copy of the notice of said judgment was made on November 30, 1978.

Appellant did not file an appeal within the thirty days after the notice of the judgment was filed in the record of the case. On the contrary, it slept on its case; and it was not until March 7, 1979, after more than three months had elapsed from November 30, 1978, that it filed a Petition for a Writ of Certiorari before the Supreme Court of Puerto Rico. And as it can be appreciated, the jurisdiction of the Supreme Court of Puerto Rico was not invoked under Rule 53.1(a) of the Rules of Civil Procedure of the Commonwealth of Puerto Rico, supra, and Article 14(a) of the Judiciary Act, supra. Rather it was invoked under Article 14(f) of the Judiciary Act (4 L.P.R.A. 37 (f) and Article 671 of the Code of Civil Procedure of Puerto Rico (32 L.P.R.A. 3492)[4]

[4] Section 3492 of 32 L.P.R.A. reads as follows: "The Supreme Court and the Superior Court of Puerto Rico are hereby authorized and empowered to issue writs of certiorari."

Since the certiorari is an extraordinary remedy, it has been ruled by the Supreme Court of Puerto Rico that: Certiorari, as well as other extraordinary remedies, *lies when no appeal or other ordinary remedy exists protecting petitioner's right effectively and rapidly. People* v. *Superior Court*, 81 P.R.R. 740 (1960). Emphasis added. In other words, the certiorari is not a substitute for the remedy of appeal or of review, specially when a party sleeps on its case and lets run the terms for appeal or for review.

Article 14 (f) of the Judiciary Act provides as follows:

> "(f) Any resolution rendered by the Superior Court may be reviewed by the Supreme Court through certiorari to be issued at its discretion and not otherwise." (4 LPRA 37 (f))

As it can be appreciated, since appellant did not appealed on time the Partial Judgment of the Superior Court herein involved, it tried said judgment to be reviewed as a resolution. Said in other words, before the Supreme Court of Puerto Rico it tried the Partial Judgment as a resolution and not as a final judgment. On the other hand, it is trying now from this Honorable Court to review said Partial Judgment as a final judgment. But appellant is precluded from appealing to this Honorable Court the instant case because it did not comply first with the jurisdictional provisions of the Commonwealth of Puerto Rico.

There is another point toward which appellee wants to call the attention of this Honorable Court. At page 2 of its Jurisdictional Statement appellant states:

> "Appellant appeals from the final judgment and order of the Supreme Court of Puerto Rico entered on March 29, 1979, denying appellant's petition for Certiorari and, thus confirming the judgment of the trial court and the validity of the tax."

In the present case the Supreme Court of the Commonwealth of Puerto Rico denied a petition for *Certiorari* filed by appellant. It is necessary to analyse the legal consequences of such a denial in order to determine whether that decision can be considered a final judgment subject to be reviewed by this Honorable Court.

Contrary to appellant's contention, appellee is of the position that the denial of the certiorari has no ultimate legal consequences in the instant case.[5]

In *Maryland* v. *Baltimore Radio Show*,[6] this Honorable Court stated that the sole significance of a *certiorari* denied is that four members of the Court deemed it desirable not to review a decision of the lower court.

> Inasmuch as all that a denial of a petition for a writ of *certiorari* means is that fewer than four members of the Court thought it should be granted, *this Court has vigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. Maryland* v. *Baltimore Radio Show, supra,* at page 919. (Emphasis added).

Also, the decision rendered in *Brown* v. *Allen*,[7] constitutes an ample analysis made by this Honorable Court regarding the legal consequences of a denial of a petition of *certiorari.*

This Court (Frankfurter, J.) in *Brown, supra,* stated the following:

> "The reasons why our denial of *certiorari* in the ordinary run of cases can be any number of things *rather than a decision on the merits* are only multiplied by the circumstances of this class of petitions. And so we conclude that in *habeas corpus* cases, *as in others, denial of certiorari*

[5] "The denial of a writ of *certiorari* has no official precedential value . . ." Barham, Mark E.; "The importance of a Writ Denial", 21 *Loyola Law Review* 835 (1975)

[6] 338 US 912 (1950)

[7] 344 US 443 (1953)

> *cannot be interpreted as an "expression of opinion on the merits".* At page 497 (Emphasis added).

The Supreme Court of the Commonwealth of Puerto Rico has stated its view on this matter on several occasions. The following are only a few examples. In *Heirs of Andrade* v. *Sosa*,[8] the Court stated that the denial of a petition for *certiorari* does not decide any question against any of the parties involved.

Then, in *Bartolomei* v. *Superior Court*,[9] the Supreme Court for the Commonwealth of Puerto Rico stated that:

> As to the scope of the phrase "petition denied" appearing in our aforesaid decision of November 2, *it is enough to say that it simply means that less than three of the seven judges who constitute this court were inclined to issue the writ,* but nowise does it import an expression of the opinion of the Court upon the merits of the case which has been the object of the petition. At page 437 (citations omitted) (Emphasis added)

In *Borinquen Furniture* v. *District Court*,[10] the Supreme Court of Puerto Rico reaffirmed its position in stating that ". . . Furthermore, in denying flatly a petition for certiorari we need not explain the reasons for our denial *nor do we express any view as to the merits of the case*". At page 861 (Emphasis added)

Having been established by the cases and authorities advanced herein that a denial of a petition for certiorari does not constitute, in any manner, neither

[8] 45 PRR 710 (1933)

[9] 77 PRR 436 (1954)

[10] 78 PRR 858 (1956)

an adjudication of the issues presented nor an affirmance of the judgment of the lower court involved, the *certiorari* denied in the present case does not constitute the final judgment referred to in 28 USC §1258,[11] from which review could be obtained before this Honorable Court.

For the aforementioned reasons appellee respectfully submits that the appeal in the present case should be denied for lack of jurisdiction.

Nonetheless, appellee also contends that the question presented for appeal in this case is unsubstantial.

II

QUESTION PRESENTED FOR APPEAL IS UNSUBSTANTIAL

The question presented for appeal by appellant is based on the ground that the imposition of a tax upon the proprietary or possessory interest of appellant in the radio licenses issued to it by the Federal Communication Commission is repugnant to Article VI, Clause 2 of the Constitution of the United States (Supremacy Clause).

The decision in the present case does not retard, impede or burden any federal function, property or law. For that reason such decision is not in conflict with the Federal Supremacy Clause of the Constitution of the United States. What the Federal Communicatons Act provides is that the channels of transmis-

[11] "The jurisdiction of this Honorable Court extends only to final judgments or decrees". *Loeber* v. *Schroeder*, 149 US 580 (1893). See also *Wright* and *Miller*, Federal Practice and Procedure Vol. 10, Section 2651, *et seq.*

sion and the assigned frequencies cannot be the object of private property.[12] But the tax herein involved is one imposed upon the appellant's very valuable possessory interest or proprietary interest represented by the license to operate an specific channel or frequency. As it was ruled by the Supreme Court of Puerto Rico in the case of *W.A.P.A. TV* v. *Secretario de Hacienda*:[13]

> ". . . In a field as practical as taxes, the clearly proprietary interest that is identified with primordial content, value, utility, and benefits which this license represents for the licensee are more important than the academic integration of classical elements in the now renovated concept of property. *Maristany* v. *Sec. of the Treasury*, 94 P.R.R. 276, 284-85 (1967). Form cannot supersede substance. The possessor's interest in the asset (citation ommitted) when he has all the practical attributes of ownership, shall be held a proprietary interest. . . ."
>
> (Appendix to Appellant Petition, pp. 14-15)

In the case of *United States* v. *County of Fresno*, 429 U.S. 452 (1977), cited by the Supreme Court of Puerto Rico in the case of *W.A.P.A. TV* v. *Secretario de Hacienda*,[14] supra, this Honorable Court makes a review of the interpretative evaluation of the Supremacy Clause. In said case this court upheld a property tax imposed by the State of California to federal employees on their possessory interests in housing owned and supplied to them by the Federal Government as part of their compensation. That decision

[12] 47 U.S.C. 301

[13] 105 DPR 816 (1977)

[14] Appendix to Appellant Petition, p. 15.

demonstrates, as well as the decision in the instant case, that each situation or problem has to be examined and solved in light of the applicable law, the circumstances in which that law has to be enforced and the specific facts of the problem. Since both cases involve tax problems, they were solved in a practical and realistic manner.

Concluding the present case does not present a substantial constitutional question. And it has been repeatedly held that the Supreme Court of Puerto Rico should not be reversed in a matter of local law unless the court's determination is "inescapably wrong" or "patently erroneous". *Sancho Bonet* v. *Texas Co., 308 U.S. 463 (1940); De Castro* v. *Board of Commissioners,* 322 U.S. 451 (1944); *C. Brewer P.R.* v. *Corchado,* 303 F.2d 654 (1962); *Acosta-Marrero* v. *Commonwealth of Puerto Rico,* 275 F.2d 294 (1960); *Fullana Corp.* v. *P.R. Planning Board,* 257 F. 2d 355 (1958); *Marquez* v. *Aviles,* 252 F.2d 715 (1958); *Iglesias Acosta* v. *Secretary of Finance of Puerto Rico,* 220 F.2d 651 (1955); *Sagastivelza* v. *P.R. Ins.,* 171 F. 2d 563 (1949); *Compose* v. *Central Cambalache, Inc.,* 1157 F.2d 43 (1946); *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41, (1970) and *Diaz Gonzalez* v. *Colon Gonzalez,* 536 F.2d 453 (1976).

CONCLUSION

For all the reasons above set forth it is respectfully requested that this appeal be dismissed for lack of jurisdiction, or that the judgment be affirmed on the ground that the question presented by this appeal is so unsubstantial as not to warrant further argument.

At San Juan, Puerto Rico, July 24, 1979

Respectfully submitted.

HECTOR A. COLON CRUZ
Solicitor General

REINA COLON DE RODRIGUEZ
Assistant Solicitor General

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1937

METRO BROADCASTING COMPANY, INC.,
APPELLANT,

v.

SECRETARIO DE HACIENDA,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

APPELLANT RAISED IN A TIMELY AND ADEQUATE MANNER ALL FEDERAL CONSTITUTIONAL QUESTIONS BEFORE THE COURTS OF THE COMMONWEALTH OF PUERTO RICO

The principal contention of the motion to dismiss is that Metro did not file a timely appeal to the Supreme Court of Puerto Rico from the judgment entered against it by

the trial court of San Juan. Although this point was never raised by the Appellee before the Supreme Court of Puerto Rico, Metro feels that it should be discussed now in order that this court understand that there are no procedural obstacles to this appeal.

At the trial court Metro sustained the position that the challenged tax was contrary to the supremacy clause of the United States Constitution. The San Juan Superior Court entered partial judgment against Metro, on November 27, 1978, deciding that the tax was valid, and that it had to be paid. (Appendix D of the Jurisdictional Statement pp. 26-69). The only pending action from then on would be the appraising of the "value" of the broadcasting license.

Metro, then, petitioned review of said judgment to the Supreme Court of Puerto Rico through Certiorari on March 7, 1979. The Supreme Court denied review without explanation.[1] (Appendix B of the Jurisdictional Statement, p. 18). Thus, the law of this case, as well as the law of Puerto Rico, remains that the licenses issued to Metro are taxable private property and that such tax is valid under the supremacy clause of the United States Constitution.

Contrary to the assertion of the Solicitor General of Puerto Rico, there was no time limit within which to request a review of the partial judgment to the Supreme Court of Puerto Rico.

Under Puerto Rico civil procedure a partial judgment which only decides liability but not damages is not "final" for purposes of appeal and is reviewable at any time prior to the fixing of damages, through certiorari, or after the

[1] It is obvious that this denial of a Certiorari cannot be cited as precedent in future cases, but it is equally evident that the highest court of Puerto Rico left undisturbed the judgment of the trial court, thus affirming it and making said judgment the law of the case.

entry of the final award of damages, through appeal or review. *Cortes Roman* v. *Commonwealth*, opinion of November 18, 1977.[2] In view of the applicability of said precedent to our case, and the failure of the Solicitor General to cite it in his motion to dismiss, we have annexed the relevant parts of said opinion as Appendix A of this reply brief.

What the appellee failed to understand is that even though said partial judgment is not final under Puerto Rican procedure it is final and appealable to this court under the criteria expounded in *Radio Station W.O.W., Inc.* v. *Johnson*, 326 U.S. 120 (1944) and *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469 (1975).

There is no possibility that the pending action at the trial court might raise any further federal constitutional questions. As a matter of fact, all federal constitutional questions had already been decided against the station owners by the Supreme Court of Puerto Rico prior to the filing of this suit in the case of *W.A.P.A. TV* v. *Secretario de Hacienda* (printed as Appendix A of the Jurisdictional Statement).

There is no possibility that Metro might eventually prevail on the merits, since the only pending hearing will be to determine the property value of the broadcasting licenses and impose a tax accordingly.

The Issues Are Substantial and Important to the Broadcasting Media as a Whole

We can think of no better way to impede the exclusive federal control over radio and television if states are recognized to have the power to tax at will the broadcasting

[2] Published in Spanish by the Puerto Rico Bar Association, 104 Colegio de Abogados 1977.

licenses issued by the Federal Communications Commission to the stations within their boundaries.

The failure of the Commonwealth of Puerto Rico to grasp the implications of this unique tax statute can only be attributed to a belief that Puerto Rico is somehow not within the federal constitutional system.

The recent reminder of this court to the contrary in *Terrol* v. *Commonwealth of Puerto Rico*, — U.S. —; 61 L.Ed. 2d 1; 99 S.Ct. 2425 (1979) has apparently been disregarded and will continue to be so ignored if this anomaly is left undisturbed.

Conclusion

For the reasons and arguments of law stated in the jurisdictional statement and thus set forth herein, this Court should note probable jurisdiction and reverse the decision of the Supreme Court of Puerto Rico determining that radio and television broadcasting licenses are private property of the station owners and taxable as such.

Respectfully submitted,

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(Translation)

In the Supreme Court of Puerto Rico

No. R-76-374

Gregorio Cortes Roman,
plaintiff-appellee,
v.
Commonwealth of Puerto Rico
and Victor Carrero Figueroa,
defendants-appellants.

Judgment of the Superior Court, Aguadilla Part,
Aladino Torres, Judge
Mr. Justice Martin delivered the opinion of the Court.

REVIEW

San Juan Puerto Rico,
November 18, 1977

This is a claim against the Commonwealth for damages sustained as a result of an accident in which the pedestrian plaintiff was run over by an automobile belonging to the Commonwealth. In its answer to the complaint, besides denying liability, the Commonwealth pleaded claimant's failure to serve notice[1] on the Secretary of Justice within the ninety-day term provided by § 3077a. of Title 32 of the Laws of Puerto Rico Annotated. Two separate trials were held at the request of the Commonwealth. Its defense of lack of notice and the question of negligence were considered in the first one. The second one was for determining the damages suffered by plaintiff.

[1] The accident took place on May 7, 1973. Notice was served on the Secretary of Justice on March 4, 1974, that is, 301 days after the accident. The complaint was filed 30 days after notice was given.

At the hearing held to consider the defense of lack of notice, plaintiff maintained, as a question of law, that the fact that there was a liability insurance policy in effect at the time of the accident exempted him from the requirement of notifying the Secretary of Justice within the ninety days following the date when plaintiff learned of the damages claimed. In his support, he cited subdivision (e) of the aforementioned § 3077a., which provides:

> No judicial action of any kind may be brought against the Commonwealth of Puerto Rico far damages caused by a culpable or negligent act of the Commonwealth, unless the written notice has been served in the form and manner and within the terms prescribed in this section, unless there is just cause therefor. *This provision shall not be applicable to those cases in which the liability of the Commonwealth is covered by an insurance policy.* (Emphasis supplied.)

As an alternative, plaintiff adduced just cause for not having notified the Secretary of Justice within the statutory term, alleging that "the delay in the service of notice is not due to negligence, lack of interest on my part, but to just cause therefor."

The lower court found for plaintiff, deciding that the said subsection (e) exempts claimant from notifying the Commonwealth because its liability is covered by an insurance policy. The lower court refused to hear the evidence offered by plaintiff in support of his allegation of just cause, adjudging that the ruling made for the plaintiff as to the question of law made the introduction of evidence unnecessary. The court's decision on the question of negligence was also adverse to the Commonwealth. Consequently, the court rendered a "partial judgment" which put an end to the two questions raised and left the determination of the damages suffered by plaintiff pending for a future hearing.

The Commonwealth came before us with a petition for certiorari to review the "partial judgment" filed 101 days after it was entered and asked us to review the decision on the notice requirement entered against the Commonwealth.

After the petition was denied, the lower court heard evidence regarding the damages, and rendered a judgment on Sept. 20, 1976, ordering the Commonwealth and the co-defendant driver to solidarily pay plaintiff the amount of $15,000 for his bodily injuries and mental suffering, plus costs and interest at the legal rate from the date of the judgment.

The Commonwealth now asks for a review of the judgment that put an end to the suit and restates its original argument, pointing out as sole error the lower court's decision "that there was no need to serve notice of the claim against the Commonwealth on the Secretary of Justice within the . . . [legal] . . . term because the State's liability was covered by an insurance policy."

Plaintiff-appellee in turn prays for the dismissal of the action on the grounds that the "partial judgment" rendered on November 28, 1975 and entered on December 8, 1975 became a final judgment on January 7, 1976, and that therefore the petition for certiorari filed on March 19, 1976, is untimely. He argues that we lack jurisdiction to consider now, in a petition for review, the same assignment of the certiorari we denied. Accordingly, plaintiff-appellee alleges that the aforesaid "partial judgment", on becoming final and unappealable on January 7, 1976, "had the force of *res judicata* and constituted the 'law of the case'." We do not agree with appellee for the reasons we shall point out below.

In view of the arguments expounded in the Motion to

Dismiss, we asked the parties to enlighten us, *inter alia*, on the following:

> ". . . if the 'partial judgment' rendered by the lower court on November 28, 1975, is '*final* and unappealable', although it does not decide the whole suit and, consequently, if the term for review should begin to run from the moment said 'partial judgment' was entered in the record, or if the term for review should be counted from the moment when the judgment which *finally* determines damages is entered . . . ."

I.

Section 14 of Act No. 11 of July 24, 1952, which provides for the review of the decisions of the Court of First Instance by the Supreme Court, states that *final* judgments of the Superior Court (other than those that may be appealed as a question of law) may be reviewed by the Supreme Court at the request of the party aggrieved by way of a petition for review to be issued at the discretion of the court. 4 L.P.R.A. § 37(b). What constitutes a final judgment?

The scope of the term "judgment," as used in the Rules of Civil Procedure, includes resolutions and any appealable order. 32 L.P.R.A. Ap. II, R. 44.1. On the other hand, the same Rules provide that every judgment shall grant the relief to which the prevailing party is entitled, even if said party has not prayed for such relief. *Id.* R. 44.3. This Rule 44 is derived from art. 188 of the Code of Civil Procedure of 1933, which defined judgment as "a final determination of the rights of the parties in an action or proceeding." When interpreting what constitutes a final judgment we have stated that a judgment is final if it determines the merits of the controversy or the rights of the parties, without leaving anything for future determination. See *Rieder* v. *Torruella*, 48 P.R.R. 846, 850 (1935). We have also held that, as a rule, "a judgment is final when it

terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce, by execution, what has been determined." See *Dalmau* v. *Quinones*, 78 P.R.R. 525, 530 (1955).

In certain cases included in the Rules of Civil Procedure, courts may render final judgments even if not all the questions raised are decided thereby. R. 44.2. Said Rule 44.2 is similar to former Rule 54(b) of the Rules of Civil Procedure of 1943; it reads as follows:

> 44.2 When *more than one claim* is presented in action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but not upon all of the claims only upon an express determination that there is no just reason for delay in pronouncing judgment on such claims until final adjudication of the case and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims, shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. 32 L.P.R.A. Ap. II R. 44.2.

In the case of *Dalmau, supra*, when constructing Rule 54(b) of 1943, which we have already stated is similar to R. 44.2 of 1958, we established the difference between the partial determination of a single claim and of several multiple claims and held that said Rule 54(b) only applied in cases involving two or more claims, and that therefore said Rule does not make a partial determination of a single claim final.[2] *Dalmau* v. *Quinones*, at 531; see 10 Wright & Miller, *Federal Practice and Procedure*, §§ 2657 *et seq.*

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[2] Federal rule 54(b), which is equivalent to our Rule 44.2 did not apply to single claim actions. The text of the federal rule was amended in 1961 to provide that in single claim actions with multiple parties a judgment may be entered as to one of the parties involved. 6 Moore, *Federal Practice* § 54.33 (2d ed. 1976). Our Rule 44.2 has remained unchanged since 1958.

The "partial judgment" rendered in the first stage of the proceedings in this single claim action, decided some of the questions at issue but not the whole claim. The case was divided at the request of the Commonwealth for the purpose of limiting the first trial to the determination of the issue of notice on the Secretary of Justice and the question of negligence. Even if the parties had stipulated that some aspects of the claim would be discussed first and that other questions in the claim would be aired later on, such an agreement would not have authorized the court to render a final judgment deciding part of the claim. See *Dalmau* v. *Quinones*, at 533. The relief to which plaintiff would be entitled, that is, the amount of damages, would still be left pending a decision. As long as this last point is not settled, the judgment cannot be final[3] because it cannot be executed. It could even happen that the damages could not be proved, the partial judgment then becoming null.

Plaintiff cites Rule 38.2 of the Rules of Civil Procedure to show that the court below has the authority to render a "partial judgment" that may be considered final and thus open to review. The following is the text of the Rule:

> The court, in furtherance of convenience or to avoid prejudice, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, and it may enter judgment in accordance with the terms of Rule 44.2. 32 L.P.R.A. Ap. II, R. 38.2.

The aforecited Rule 38.2 undoubtedly empowers the court to order a separate trial of any independent litigious issue for convenience or to avoid prejudice, and to enter judgment pursuant to the provisions of Rule 44.2. Precisely in said Rule 38.2 the trial court found support to

[3] See *Barrientos* v. *Gov. of the Capital*, 97 P.R.R. 539, 558 (1969).

hold a separate trial on the issue of notice and the question of negligence. But the power granted to the court by Rule 38.2 to separate independent litigious questions does not extend to the entry of final judgments on said questions, for Rule 38.2 itself limits the power to enter judgment to multiple claim actions. When Rule 38.2 provides for the judgment to be entered, it expressly refers to the judgments that may be entered under Rule 44.2. The case of *Dalmau* was decided under former Rule 42(b) of 1943, which was equivalent to Rule 38.2 in force, and which did not have the spur added in 1958 regarding Rule 44.2 to the effect that the court ". . . may enter judgment in accordance with the terms of Rule 44.2." However, when we decided *Dalmau* we construed Rules 42(b) and 54(b)—then in force—together, even though said spur did not exist then, and we held that the interaction of both rules had the effect of limiting the power of the courts to enter final judgments, but only in multiple claim cases.

A cursory examination of current Rule 44.2 reveals the power of the courts to enter final judgments deciding one or more claims in multiple claim suits if the court expressly concludes that there is no reason to postpone the judgment on said claims until the whole suit is settled, and provided that it is expressly ordered that judgment be entered. However, it also provides that any decision other than those mentioned therein (i.e. single claim actions) which does not settle all the claims shall not terminate the suit with regard to any of the claims. In other words, in multiple claim actions, the court may adjudge one or several of them, but it may not adjudge one part of a single claim action.

It should be pointed out that the question raised before us is whether the decision regarding the defense of lack of notice on the Secretary of Justice under 32 L.P.R.A. § 3077a. constitutes a final judgment which defendant

should have appealed. Since said decision was unfavorable to the Commonwealth, the suit was not finished, rather it constituted an interlocutory decision which appellant was not obliged to appeal until the whole case was adjudged. And furthermore, since it is only one claim and not several multiple claims, the judgment did not become final until the damages were adjudged. See *Barrientos, supra,* at 558.

In view of the above, we hold that with the awarding of damages for this claim the court put an end to the suit, thus making the judgment entered ripe for execution. Therefore, the parties may now present for review any of the partial adjudications previously entered by the court below, including the question of the service of notice required by § 3077a. of the Laws of Puerto Rico Annotated.

. . . . . .

CLERK'S CERTIFICATE

I Ernesto L. Chiesa, Clerk of the Supreme Court of Puerto Rico, Do Hereby Certify:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on November 18, 1977, in case No. R-76-374, *Gregorio Cortes Roman* v. *Commonwealth of Puerto Rico and Victor Carrero Figueroa,* the original of which, in Spanish, is under my custody in this office.

In Witness Whereof, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 11th day of July, 1979.

(s) Ernesto L. Chiesa
Ernesto L. Chiesa
Clerk
Supreme Court of Puerto Rico

[seal]
[stamps]